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ALEXANDER L. STEVAS,
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

No. 80-1729

NICHOLAS MAZUR, Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION
CIVIL SERVICE COMMISSION
GOVERNOR'S ADMINISTRATIVE OFFICE
AND AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES
(AFSCME), Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF FOR COMMONWEALTH RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Court of Appeals for the third circuit commit legal error in affirming the District Court's judgment of lack of jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Federal Constitution (In addition to the provisions cited by Petitioner).

AMENDMENT XI

The Judicial power of the United Staes shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State.

STATEMENT

This appeal involves a lawsuit initiated in the United States District Court for the Eastern District of Pennsylvania by the Appellant, Nicholas Mazur, on his own behalf, on November 9, 1979. That action attempted to challenge the failure of the Pennsylvania Supreme Court to consider his allegations that the Respondents had denied him rights guaranteed by: the Pennsylvania

Public Employee Relations Act of 1970, 43 P.S. §1101.101 et seq. (Act 195); various provisions of the Pennsylvania Civil Service Act of 1941, 71 P.S. s741.1 et seq.; and, the Pennsylvania law giving preferences in employment to veterans, 51 Pa. C.S. §§7101 et seq.

All of the Respondents filed Motions to Dismiss including assertions that the District Court did not have jurisdiction over the matter.

On March 4, 1980 Judge Troutman issued his Opinion and Order finding that the District Court had no jurisdiction over the matter and he dismissed Mazur's complaint. Mazur appealed this order to the Court of Appeals for the Third Circuit. The Third Circuit affirmed the lower court's judgment, without argument by Order dated March 30, 1981.

Mazur then filed the present Petition with this Court.

ARGUMENT

1. The issue in the present case is a narrow one concerning the jurisdictional question which the District Court addressed. The Petitioner does not address this matter in his Petition but rather argues the merits of his claims, which were rejected by both the Administrative and Judicial forums of Pennsylvania.

The Petitioner has not raised any arguments concerning why this case merits the extraordinary review of the Court. It is the firm contention of the Commonwealth Respondents that nothing about this case merits any review by this Court. The lower courts here have not even arguably failed to correctly construe any decision of this Court. The Petitioner has not cited, nor do the Respondents believe, that there is any conflict

among the circuits on this narrow jurisdictional issue.

In sum, there are present none of the traditional standards which this Court requires in order to exert the exceptional jurisdictional power of Certiorari.

The Commonwealth Repondents assert that the only issue which is properly able to be argued before this Court is whether the District Court erred in dismissing Mazur's complaint for want of jurisdiction. It must, therefore, be noted that although the Commonwealth Respondents are aware of both Mazur's pro se status, and the Court's duty to avoid injustice by liberally construing the pleadings because of his status, parts of his Petition are simply not properly before this Court. The Commonwealth Respondents argue that any part of his Petition not addressing the issue

of the District Court's jurisdiction is not relevant, and not properly a matter for this Court's consideration.

It is the Commonwealth Respondents' contention that the determination made by Judge Troutman was entirely proper and that, not only did Mazur not cite any proper jurisdictional statutes as required by F.R.C.P. 8(a)(1), but also that, there simply is no statute giving the District Court subject matter jurisdiction over Mazur's complaint.

Mazur in his complaint cited a Pennsylvania statute, Section 204 of the Appellate Court Jurisdiction Act of 1970 (17 P.S. §211.204), as the District Court's jurisdictional basis. The District Court properly stated that this Act, which had been repealed and then substantially reenacted by Section 724 of Pennsylvania Judicial Code, 42 Pa. C.S. §724, neither attempted to nor

could provide the Federal District Court jurisdiction of any kind.

This Court has often stated that federal courts possess limited jurisdiction, conferred only as the Constitution and Congress direct. Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978). In order to protect the "rightful independence" of state governments, the federal courts are required to confine their own jurisdiction to the precise limits that federal statutes have defined. Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971).

There are simply no statutory grounds for the District Court in this matter.

The District Court reviewed all of the arguably relevant statutes and they simply do not confer any jurisdiction upon the District Court. Mazur now has attempted to cite both the Labor

Management Relations Act, 29 U.S.C. §§141 et seq. and the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§401 et seq. The District Court correctly found both of these acts expressly exclude public employees from their coverage.

Respondents, Pennsylvania Department of Transportation, Civil Service Commission, and the Governor's Office of Budget and Administration are cabinet-level departments through which the executive branch of the Commonwealth of Pennsylvania carries out its duties and responsibilities. Administrative Code of 1929, Act of April 9, 1929, P.L. 177, art. 11, §201, 71 P.S. §61, as amended. As such the language of 29 U.S.C. §152(2) and §402(e) excludes them from the definition of "employer." The Federal Courts have recognized this exemption. Crilly v. Southeastern Pennsylvania Transportation Authority, 529 F.2d 1355 (3rd Cir. 1976). See also Stevens v. Carey, 483 F.2d 188 (7th Cir. 1973).

The District Court could not find any other arguable statutory basis. The Commonwealth Respondents, after thorough research, are convinced that no other statutory jurisdictional basis exists.

Commonwealth Repondents did raise before the District Court and the Court of Appeals for the Third Circuit the issue of the bar of the Eleventh Amendment to this case, and properly reassert that defense. That is, should this Court find a jurisdictional basis for this action it must be viewed in light of the Eleventh Amendment.

The Eleventh Amendment provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State."

It has been uniformly held that an "unconsenting state is immune from suits brought

in federal courts by her own citizens as well as by citizens of another state." Edelman v. Jordan, 415 U.S. 651, 662, 663 (1974); Employees v. Department of Public Health and Welfare, 411 U.S. 279, 280 (1973).

The Eleventh Amendment to the United States Constitution is a grant and recognition of the doctrine of the state's sovereign immunity. The history and tradition of the Eleventh Amendment indicate that this sovereignty creates a barrier by which a federal court is not competent to render judgment against a nonconsenting state.

In addition, the Amendment bars suits against agencies of the states. Alabama v. Pugh, 438 U.S. 781 (1978). Appellees, Pennsylvania Civil Service Commission, Department of Transportation, and the Governor's Office of Budget and Administration are cabinet-level departments through which the executive branch of the Commonwealth of Pennsylvania

carries out its duties and responsibilities. Administrative Code of 1929, Act of April 9, 1929, P.L. 177, art. 11 §201, 71 P.S. §61, as amended. Consequently, this action against Respondents Pennsylvania Civil Service Commission, Department of Transportation and the Governor's Office of Budget and Administration must be dismissed for lack of jurisdiction, Alabama v. Pugh, supra; Edelman v. Jordan, supra.

Finally, the Petitioner has argued that the District Court had a duty to be a "surrogate attorney" for him since he is acting pro se. There is no such duty upon the District Court. However, as Judge Troutman noted in his opinion, the District Court must proceed carefully to insure that the pro se litigant will not be deprived of rights merely because of inexpertly drawn pleadings. See Gibbs v. Burke, 337 U.S. 773 (1949). It is clear that the District Court not only construed Mazur's complaint liberally, as

required, but went well beyond the complaint to determine if any jurisdictional basis existed.

Not only is there no legal precedent for requiring the District Court to be a "surrogate attorney" for pro se litigants but also this is neither theoretically sound nor practically possible. While it may be unfortunate that some individuals cannot afford the services of an attorney, the Court cannot both represent the pro se and decide the case in an unbiased manner. This is not the historical role of a Judge and certainly not the role of the District Court Judge in this Federal System.

However, even if the Judge could so operate, theoretically, the workload of any Judge in the Federal System, in fact, is simply too great to require that he not only sit in judgment but also represent pro se litigants. Such a requirement

has no relationship to reality or the traditional role of the Judge.

CONCLUSION

The Commonwealth Respondents assert that there do not exist any extraordinary reasons for this Court to extend its discretionary jurisdiction of Certiorari. For the foregoing reasons, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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